91-1810

No. 91-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

REGGIE LAMONT TOLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

IN A CRIMINAL PROSECUTION, MAY THE GOVERNMENT PRESENT THE TESTIMONY OF EXPERT WITNESSES THAT BASED ON THEIR EVALUATION OF DEFENDANT'S CONDUCT, HE IS GUILTY OF THE CHARGED CRIME?

II

WHETHER THE PRACTICE OF NOT DEVIATING FROM PATTERN INSTRUCTIONS IN FEDERAL CRIMINAL JURY TRIALS UNDERCUTS THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE TO THE CHARGES BROUGHT AGAINST HIM, WHERE HIS PROFFERED INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW AND WAS PARTICULARLY APPLICABLE TO THE FACTS AT BAR AS WELL AS TO DEFENDANT'S THEORY OF THE CASE?

III

DO THE SENTENCING GUIDELINES REQUIRE FEDERAL DISTRICT COURTS TO TREAT A DEFENDANT AS A CAREER CRIMINAL MERELY BECAUSE HIS PRIOR CONVICTIONS WERE CONSOLIDATED FOR SENTENCING UNDER STATE LAW RATHER THAN FEDERAL LAW?

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The reviewing court in this matter, the United States Court of Appeals for the Ninth Circuit, issued a memorandum disposition pursuant to Circuit Rules 36-1 and 36-3 (memorandum dispositions not to be published). A copy of that memorandum is appended to this petition as Appendix A.

Jurisdictional Statement

The memorandum disposition in this matter was filed in the Court of Appeals on December 16, 1991. A petition for rehearing on the basis that the Court of Appeals omitted consideration of a material issue raised and briefed by the parties was filed in that court on December 30, 1991, and was denied by that court by order filed February 11, 1992. A true and correct copy of that order is appended to this petition as Appendix B, and the petition is timely brought before this Court pursuant to Supreme Court Rule 13. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rule of Evidence 704:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are for the trier of fact alone.

United States Sentencing Guidelines

§ 4A1.1: *Criminal History Category* (Effective Nov. 1, 1990)
The total points from items (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A

(a) Add three points for each prior sentence of imprisonment exceeding one year and one month.

(b) – (e) (Not in Issue)

§ 4A1.2 *Definitions and Instructions for Computing Criminal History* (Effective Nov. 1, 1990)

(a) *Prior Sentence Defined*
(1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendre*, for conduct not part of the instant offense.
(2) Prior sentences imposed in related cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of criminal history. Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

(b) (Not in Issue)

* * *

Application Note 3 (Effective Nov. 1, 1990)

Related Cases: Cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing . . .

Statement of the Case

On November 23, 1990, petitioner, Rodney Butler, and Tina Ruffin were arrested at Los Angeles International Airport (LAX) just prior to boarding a flight to San Jose. They had come to the attention of a joint narcotics task force, comprised of Los Angeles County Sheriff's Officers, Los Angeles City Police, and Drug Enforcement Administration (DEA) agents by reason of certain "suspicious activity"; e.g., looking around, being in a hurry, and wearing blue clothing. Ms. Ruffin's arrest resulted in the discovery of a large amount of cash on her person; Mr. Butler's arrest led to the discovery of two kilograms of cocaine. Neither any money nor any drugs were found on Mr. Toler's person or in any of the items in his possession. All three were charged with conspiracy to possess and possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1)

At trial, one of the sheriff's officers, a Deputy Beers, testified as part of the government's case in chief as an expert witness in narcotics investigations. The government established that Beers had been trained by the Sheriff's Academy and Patrol School in narcotics enforcement, had completed two community college courses in basic and advanced narcotics investigation, and had also attended a number of seminars given by the California Narcotics Officers Association, as well as one respecting airport investigation of narcotics couriers held in Phoenix, Arizona. Beers' experience included making more than 1000 narcotics-related arrests, purchasing drugs in an undercover capacity, selling drugs in sting operations,

interviewing arrestees, evaluating evidence, and testifying in court as an expert witness on more than 75 occasions in that time span.

Having established Deputy Beers as an expert, the government introduced his "expert" opinion that petitioner and the other two defendants were working together in an enterprise to transport cocaine from Los Angeles to San Jose, and that petitioner's role in the alleged enterprise was as the "leader".

At the conclusion of trial, petitioner requested a jury instruction on reasonable doubt. Such requested instruction contains two pertinent statements of the law:

> . . . A reasonable doubt is one based on reason and common sense–the kind of doubt that would make a person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.
>
> The jury will remember that a defendant is never to be convicted on mere speculation and conjecture.

At the charge conference, the court and petitioner's counsel discussed this instruction. Counsel first asserted that the instruction which the court indicated it was giving, Model Criminal Instruction no. 3.03 (9th Cir.

1989)[1] did not include a couple of pertinent statements of the law, and was permitted to call the court's attention to the fact that that the Ninth Circuit's approved instruction lacked anything respecting conviction on speculation and conjecture. The District Court, however, cut off further discussion and refused the requested instruction.

Petitioner was sentenced by the District Court to 168 months imprisonment, to run concurrently on each count, with a supervised release period of 4 years thereafter. The record adduced at the sentencing hearing demonstrated that Mr. Toler's prior criminal record consisted of two prior convictions. Although the offenses were committed on separate dates, pursuant to state practice Mr. Toler pled guilty to both and was sentenced on the same day.

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[1] That instruction states:

A reasonable doubt is one based on reason and common sense, and may arise from a careful consideration of all the evidence, or from lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty.

If after a careful and impartial consideration with your fellow jurors of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration with you fellow jurors of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Reasons for Granting the Writ

This case presents this Court with the opportunity to resolve a substantial split among the Circuit Courts of Appeals as to the extent "expert" witness testimony can be utilized to prove the guilt of a defendant. On the one hand, several courts have refused to allow the government to present an expert's conclusion that a defendant is guilty. Other courts have allowed such testimony. Because this issue potentially affects all criminal prosecutions, and because there is a stark split of authority, certiorari is appropriate.

This case also presents a burgeoning issue: how far may the Circuit Courts of Appeal go in formulating, and encouraging strict adherence to, "pattern" jury instructions in criminal cases? Can they go so far as to preclude consideration of a "position"[2] instruction requested by the defendant, when such is supported by both the facts of the case and by the law applicable thereto?

Finally, did the application of the Federal Sentencing Guidelines to the case at bar preclude the District Court from considering two prior cases consolidated for sentencing in state court to be "related" cases under the guidelines? As will be seen, the Eleventh and the Ninth Circuits have issued opinions which are irreconcilable on this issue.

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[2] A "position" instruction, in common parlance, is one which explicates a party's theory of the case, thus giving him a legal "position" from which to argue to the jury.

I.

CERTIORARI MUST BE GRANTED TO RESOLVE THE SUBSTANTIAL SPLIT OF AUTHORITY WHICH EXISTS WITHIN THE FEDERAL CIRCUITS AS TO WHETHER AN EXPERT MAY GIVE AN OPINION THAT A DEFENDANT IS GUILTY OF THE CRIME WITH WHICH HE HAS BEEN CHARGED.

The prosecution established that deputy sheriff Daniel Beers was an expert in narcotics transactions, introducing evidence that he had made more than 1,000 narcotics-related arrests, purchased drugs as an undercover officer, sold drugs in sting operations, and testified as an expert more than 75 times. After establishing this expertise, the prosecution introduced deputy Beers' opinion that based on his observations of Mr. Toler's behavior, he believed Mr. Toler was working with Ms. Ruffin and Mr. Butler in a scheme to transport cocaine from Los Angeles to San Jose and that Mr. Toler was the leader of the scheme. Certiorari must be granted to review the admission of this "expert" testimony because the Ninth Circuit's decision allowing such evidence reflects a growing split in the appellate courts on an issue of fundamental importance.[3]

Until 1984, Federal Rule of Evidence 704 ("Rule 704") provided that opinion testimony from an expert was not

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[3] Although this issue was fully briefed by both parties in the appellate court, the court's opinion made no mention whatever of the issue. (*See* Appendix A.) Similarly, although Mr. Toler petitioned the appellate court for rehearing on this issue, the court's summary denial of the rehearing petition made no mention of the issue. (*See* Appendix B.)

inadmissible merely because it embraced the ultimate issue to be decided by the factfinder. In 1984, however, Congress amended this rule to make clear that an expert could not give an opinion as to whether a defendant had a mental state or condition where such was an element of the crime:

> "(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> "(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

The Courts of Appeals have reached starkly conflicting decisions in applying the 1984 amendment precluding expert "opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged."

On the one hand, several courts have held that although an expert may properly testify about a defendant's actions, Rule 704(b) precludes the expert from going further and giving an opinion as to defendant's culpability which he may have drawn from those actions. *See, e.g., United States v. Scop*, 846 F.2d 135, 139-142, *reversed on other grounds on rehearing*, 856 F.2d 5 (2nd Cir. 1985) (in securities fraud prosecution, government expert

testified that based on his review of the facts, defendants were engaged in a scheme to manipulate stock: held, Rule 704(b) violated); *United States v. Felak*, 831 F.2d 794, 797 (8th Cir. 1987) (expert testimony that defendant did not have requisite mental state needed for conviction properly excluded); *United States v. Hillsberg*, 812 F.2d 328, 331-332 (7th Cir. 1987) (same). Other courts have gone further, holding that Rule 704(b) also precludes the introduction of expert testimony from which the jury could infer that defendant did not harbor the requisite intent necessary for conviction. *See, e.g., United States v. Brodie*, 858 F.2d 492, 495-496 (9th Cir. 1988) (in tax evasion prosecution, trial court excluded defense expert's opinion that defendant owed no taxes for the year in question: held, Rule 704(b) precluded such an opinion because it would have allowed the jury to infer that defendant did not harbor the requisite mental state needed for conviction).

On the other hand, several courts have reached completely contrary results, holding that in addition to testifying about a defendant's actions, Rule 704(b) does not preclude an expert from going further and giving an opinion as to defendant's culpability which the expert has drawn from those actions. *See, e.g., United States v. Dotson*, 817 F.2d 1127, 1132 (5th Cir. 1987) (in tax evasion prosecution, trial court admitted government expert's testimony that defendant "willfully and intentionally increased his income knowing full well that he had not reported the taxes due thereon:" held, admissible under Rule 704(b)); *United States v. Bosch*, 914 F.2d 1239, 1243 (9th Cir. 1990) (in narcotics conspiracy prosecution, trial court admitted government expert's testimony that in his

opinion, defendant aided and abetted the conspiracy: held, admissible under Rule 704(b).) Other courts have held that Rule 704(b) does not preclude expert testimony from which the jury could infer that defendant harbored the requisite intent necessary for conviction. *See, e.g., United States v. Caswell,* 825 F.2d 1228, 1236 (8th Cir. 1987) (in tax evasion prosecution, trial court properly admitted government expert's opinion that defendant owed taxes for the year in question even though such an opinion allowed the jury to infer that defendant harbored the requisite mental state needed for conviction).

In this case, deputy sheriff Beers testified that in his expert opinion, an opinion fortified by years of training and thousands of arrests, Mr. Toler was part of a conspiracy to transport cocaine and that he was the leader of the scheme. This testimony went well beyond furnishing the jury with expert testimony about modus operandi with which it could evaluate Mr. Toler's conduct. Instead, it explicitly told the jury that in deputy Beers' expert opinion, Mr. Toler had the requisite intent necessary for conviction and was guilty of the charged crimes.

Because admission of this testimony was a violation of Rule 704(b) which constituted plain error, and because there is a fundamental split of authority in the appellate courts as to the appropriate scope of this section, certiorari is appropriate on this issue.

II

CERTIORARI MUST BE GRANTED TO RESOLVE THE ISSUE OF WHETHER THE FEDERAL COURTS CAN INSIST ON GIVING ONLY "PATTERN" INSTRUCTIONS IN CRIMINAL CASES WHERE THE EFFECT OF SAME IS TO UNDERCUT THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE.

In recent years, the formulation of pattern jury instructions has become a practice expressly approved by the Circuit Courts of Appeals. It has been observed by scholars concerned with the actual effect of jury instruction upon juries that such instructions are written more to withstand appellate attack than to inform juries what the law is in relation to a particular case before them. See, e.g., Charrow, *Linguistics and the Jury,* 8 U. Bridgeport L.Rev. 303, 206 (1989). While this attack may be too broad, as there are certainly those who attempt to parse jury charges in language jurors can understand, the possibility of reversal for failure to follow the precise language of a pattern instruction is an undeniable specter to overworked District Court judges and prosecutors. *Ibid.*

This specter is especially apparent with instructions involving the concept of reasonable doubt. In that regard, this Court has observed that efforts to explain that concept usually do not make it any more understandable. *Holland v. United States,* 348 U.S. 121, 140 (1954)[4] The

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[4] Nevertheless, this Court has, in *Cage v. Louisiana,* 498 U.S. ___, 112 L.Ed.2d 339 (1990) disapproved the use of "grave uncertainty" and "actual substantial doubt" as requiring a "higher degree of doubt than is required for acquittal under the reasonable doubt standard."

Ninth Circuit, in particular, has experienced difficulty with amplified instructions, *see, e.g., United States v. Nolasco,* 926 F.2d 869 (9th Cir. 1991) (en banc), and now prefers, as in the case at bar, to leave the matter to the "sound" discretion of the trial court. *Id.,* at 872. As observed in *Nolasco,* several circuits, in fact, condemn or discourage anything more than a simple statement of the term, while others require elaboration so that the jury may understand it. *Ibid.* There is a growing body of empirical research supporting the latter view. See, gen. Siffert, *Instructing on the Burden of Proof and Reasonable Doubt,* 8 U. Bridgeport L.Rev. 365 (1989). The tension between the institutional interest in avoiding reversible error and the competing concern that the jury understand the reasonable doubt concept is thus quite real.

The latter concern, however, is of constitutional dimension. There is

> No question that a defendant in a criminal case is entitled to have the jury know what he contends, and that ordinarily he is entitled to a "theory of defense" or "position" instruction if he makes a timely request for such an instruction, if the request is supported by the evidence, and it sets out a correct declaration of the law.

United States v. Brake, 596 F.2d 337, 339 (8th Cir. 1979); *see also United States v. Tarantino,* 846 F.2d 1384, 1400 (D.C. Cir. 1988); *United States v. Kim,* 884 F.2d 189, 193 (5th Cir. 1989); *United States v. Washington,* 797 F.2d 1461, 1476 (9th Cir. 1986); *United States v. Hoffner,* 777 F.2d 1423, 1426 (10th Cir. 1985).

The right to a "theory of defense" instruction arises out of the recognized right of a criminal defendant to

present a defense under the Sixth Amendment, see, e.g., *Faretta v. California*, 422 U.S. 806, 818 (1975) ("In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it."), and the "unique power" the trial court exercises in instructing the jury. *Carter v. Kentucky*, 450 U.S. 288, 303 n. 20 (1981) It would be a deprivation of fundamental fairness under the Due Process Clause of the Fifth Amendment to impair full presentation of a theory of the defense case in the name of warding off possible instructional error.

These considerations have come to a head in the case at bar. What defense counsel requested is a time-honored and long approved elaboration of the reasonable doubt concept, the "hesitate to act" formulation, *Holland, supra*, at 140, and, more importantly to this particular case, the abjuration that the defendant must never be convicted on mere speculation and conjecture. See *United States v. Hart*, 640 F.2d 856, 860 n. 3 (6th Cir. 1981) The latter abjuration was the crux of his case. Lacking the instruction, petitioner had no support for his contention that Beers' purported "expertise" was no more than suspicion. It is difficult enough to contend with pronouncements of "experienced" DEA agents seeking to supply a reasonable suspicion for an investigative stop (e.g., the "drug courier profile"). When, through so-called "expert testimony," those pronouncements are raised to the level of proof of knowledge and/or conspiracy, the task of defense counsel becomes formidable indeed. Thus, the opportunity to argue that the law, as read to the jury by the court, does not permit a conviction to stand on such official pronouncements because all they amount to is conjecture, becomes a paramount consideration in cases

of this nature. Mr. Toler was unfairly deprived of the opportunity to make this argument meaningful to the jury.

Based on the foregoing, it is plain that certiorari must be granted. The refusal to give a requested theory of the case instruction relating reasonable doubt to the facts of a particular case is fundamentally unfair and deprives the defendant of his right to due process of law and his right to present a defense.

III.

CERTIORARI MUST BE GRANTED BECAUSE THE NINTH CIRCUIT'S DECISION HINGES THE SEVERITY OF A DEFENDANT'S SENTENCE ON A TOTALLY FORTUITOUS CIRCUMSTANCE; E.G. WHETHER TWO PRIOR CONVICTIONS WERE CONSOLIDATED FOR SENTENCING UNDER STATE RATHER THAN FEDERAL LAW

Sentencing Guideline section 4A1.1(a) provides that the sentencing court should "add three points for each prior sentence of imprisonment exceeding one year and one month." Application Note 1 to this section explicitly makes clear that "[p]rior sentences imposed in related cases are to be treated as one sentence for purposes of criminal history." Application Note 3 to Sentencing Guideline 4A1.2(a)(2) provides that "[c]ases are considered related if they . . . were consolidated for trial *or sentencing*." (Emphasis added.)

In this case, the record shows that Mr. Toler had suffered two prior convictions in California. The record is equally clear, however, that pursuant to well established

state law, Mr. Toler pled guilty to both offenses and, although the cases did not have a common docket number, they were joined for sentencing. Mr. Toler was sentenced on both cases at a consolidated proceeding. Following Ninth Circuit precedent, the District Court added three points for *each* prior sentence.

Certiorari is appropriate on this issue for two reasons. First, this result ignores the plain language of Application Note 3 precluding a three point assessment under Sentencing Guideline section 4A1.1(a) for cases which are "consolidated for sentencing." The court's refusal to follow Application Note 3, apparently based on the fact that the two prior cases did not have a common docket number, is a triumph of form over substance and should be reviewed.

More important, however, is that the Ninth Circuit's approach reflects a fundamental split in the appellate courts which totally undercuts the very reason why the sentencing guidelines were enacted in the first place. In this regard, one of the primary purposes of the Federal Sentencing Guidelines was to achieve uniformity in sentencing. U.S. Sentencing Commission, Federal Sentencing Guidelines Manual, Policy Statement 1.2 (November 1, 1989).

In *United States v. Delvecchio,* 920 F.2d 810 (11th Cir. 1991) the Eleventh Circuit held that when a criminal defendant pled guilty to two unrelated crimes under Federal Rule of Criminal Procedure 20(a), but was sentenced for both crimes at one sentencing proceeding, the offenses were deemed to be related and would not justify

a separate three point addition under the guidelines for each offense. 920 F.2d at 812-813.

In this case, as in *Delvecchio,* Mr. Toler pled guilty to two unrelated offenses and was sentenced on the same day. The *only* difference between this case and *Delvecchio* is that Mr. Toler's guilty plea and joint sentencing were held pursuant to state law rather than Federal Rule of Criminal Procedure 20(a).

A system in which the severity of a criminal defendant's sentence depends solely on the fortuitous circumstance of whether the consolidation occurs under federal or state law cannot possibly achieve the goal of uniformity in sentencing. Certiorari is appropriate to insure that the primary goal of the sentencing guidelines is not frustrated.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel of Record

GARDNER & DERHAM
CLIFF GARDNER

Counsel for Petitioner
Reggie Lamont Toler

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	CA No. 90-50484
Plaintiff-Appellee,	)	DC No. CR-89-0935-ER-2
v.	)	
REGGIE LAMONT TOLER,	)	MEMORANDUM*
Defendant-Appellant.	)	(Filed Dec. 16, 1991)

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Submitted** November 4, 1991
Pasadena, California

Before: FARRIS, PREGERSON, THOMPSON, Circuit Judges.

Our careful review of the record satisfies us that there was sufficient evidence to support the conviction. There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit rule 34-4.

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Pisello*, 877 F.2d 762, 764 (9th Cir. 1989).

The jury instructions, considered as a whole were neither misleading or inadequate. *See United States v. Spillone*, 879 F.2d 514, 525 (9th Cir. 1989). Toler could argue his theory of the case under the instructions given. We find no abuse of discretion.

To the extent that it involves a mixed question of law and fact, the district court's application of the Sentencing Guidelines is reviewed *de novo*. *United States v. Davis*, 922 F.2d 1385, 1387 (9th Cir. 1991). The district court's determination of the facts underlying its application of the Guidelines is reviewed for clear error. *Davis* at 1387-88. We find no error in the district court's career offender designation. Application Note 3 when read in conjunction with pages 5-10 of Toler's presentence report would justify an upward departure from a three point to a six point description. Further, *Toler*'s prior offenses were not formally consolidated *and* the sentences were consecutive. We understand but reject his argument.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	CA NO. 90-50484
Plaintiff-Appellee,	)	DC No. CR-89-0935-ER-2
v.	)	(Central Dist. of CA)
REGGIE LAMONT TOLER,	)	ORDER
Defendant-Appellant.	)	(Filed Feb. 11, 1992)

Before: FARRIS, PREGERSON, THOMPSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.